

Striking While the Iron is Hot

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Boris Johnson will [reportedly head to Scotland this week](#) in order to demonstrate the benefits of the British union. His visit is likely triggered by the [11 point 'roadmap'](#) unveiled on Sunday by the Scottish National Party (SNP) to hold another independence referendum, should they win the Scottish Parliamentary elections in May.

While Mr Johnson has a relatively straightforward legal power to deny moves towards Scottish independence, politically his hand is not strong. He must convince the Scottish people that a referendum should not be held – a challenging task for an unpopular, Brexit backing prime minister north of the border. The SNP, widely expected to win the upcoming election, have taken control of the narrative, converting their weaker legal position into enormous political pressure on the British Government. The United Kingdom is at a critical juncture: the country risks becoming a ['failed state'](#), according to former Prime Minister Gordon Brown, unless the Scottish issue can be resolved.

A Live Issue

The 2014 Scottish independence referendum was won 55 percent- 45 percent by those who favoured remaining in the union. However, the ruling SNP [are on course to win the 2021 Scottish Parliament election](#) in May on a manifesto pledging to hold a second independence referendum. Polling suggests that such a referendum would be successful: 20 successive polls across 2020-1 have shown a majority for independence. There are several reasons why desire for Scottish independence is high. Most obviously, Brexit is unpopular in Scotland. An association between Scottish independence and EU membership has become embedded, with the Europhile SNP now arguing that the only way for Scots to regain their EU citizenship is through an independent Scottish state. The process of leaving the EU has also boosted desire for Scottish independence. 'Taking back control' seems to apply within the UK, with the Johnson government [centralising power](#) in London. [Mr Johnson himself is enormously unpopular in Scotland. Even the response to COVID-19](#) has displayed the tension between the UK nations and driven up approval of the SNP Government in Scotland. The political route to Scottish independence thus seems to exist, but legally there are problems in achieving independence.

The Constitution

The British constitution is built around the sovereignty of the British Parliament. Due to the imbalanced population across the UK nations, Scotland has 59 MPs in the 656-seat chamber. Therefore, if Scotland's MPs attempted to pass legislation to hold

a second independence referendum then it would simply be voted down by MPs from the other UK nations.

Scotland has a devolved parliament and government as set out by the Scotland Act 1998. The parliament is of limited competences: a reserved powers model is used, whereby anything not specifically reserved for the British Government in the Scotland Act is automatically devolved to Edinburgh. Reserved powers include defence, most financial powers and matters pertaining to the Union (Schedule 5). It is possible for an Act of the Scottish Parliament to be found *ultra vires* in the courts. [It has been speculated that Schedule 5 would rule out the power to hold an independence referendum, but in truth no one knows as the matter has never been tested in court.](#) In essence, the British parliament unambiguously has the power to legislate for a second Scottish independence referendum but is controlled by unionist parties from other UK nations. The Scottish Parliament is controlled by the pro- independence side, but no one knows if it can legislate to hold an independence referendum. A look back to 2014 is illustrative for how an SNP Government may force a referendum.

The 2014 Referendum and Section 30

The 2014 referendum was legally facilitated through the 2012 Edinburgh Agreement between the Scottish and British Governments. Both sides were politically keen to hold the referendum, with motivation to not concede a potential referendum power to Scotland on the British side and the desire for a clear, legally binding referendum on the Scottish side. As a part of the Agreement, a Section 30 order was made under the Scotland Act, which temporarily grants the Scottish Parliament power over a reserved matter. Therefore, the question of whether the Scottish Parliament has the power to hold an independence referendum without British Parliamentary permission was left untested, as both sides were motivated for the referendum to go ahead. Enacting the results of a referendum does also require British Parliamentary authorisation as there is no such thing as a legally binding referendum in the British Constitution. However, a political convention to enact referendum results seems to be entrenched following the 2016 Brexit referendum.

A political high wire and the 11-point plan

The task of achieving a second independence referendum is fraught with political danger for Scottish First Minister Nicola Sturgeon. She faces factionalism, with a section of the SNP committed to an immediate referendum, or even a unilateral declaration of independence. This risks transforming the circumstances of Scotland into something like that of Catalonia, whereby independence is not achieved legally and is delegitimised. European Union membership, key for Scotland's independence aspirations, would be imperilled by such a move.

There are two realistic options available to Sturgeon. First, a Section 30 order could be requested as in 2014. This would almost definitely be denied by the British Government, but it would be politically sound as a strategy to drive up support for

Scottish independence. The second option is to legislate for a second independence referendum in the Scottish Parliament. The [SNP's 11 point roadmap](#) seems to resolve the tension between these two paths to a second referendum, as well as appeasing those in the party who want immediate action. Essentially, the process begins with legislation for a second independence referendum in the Scottish Parliament along with a request for a Section 30 order. If the order is denied, the roadmap invites the British Government to either stand aside and allow the referendum to proceed, or to challenge it in the courts. The roadmap therefore seizes the political advantage and forces London to a position of denying Scotland a referendum. Simply, all of the Scottish Government's actions, including legislating for an independence referendum in the Scottish Parliament, is designed to put political pressure on London. This is because even if a lawful referendum was held through Holyrood, Westminster would need to pass legislation to enact the results of that referendum. The issue of a Holyrood authorise referendum is therefore simply another tool to pressure the British Government. The SNP are forcing the issue with their political mandate to counter the fact that, as per constitutional law, the British Government are in the stronger position.

Political Manoeuvring

The 11- point plan is a high-stakes move by the SNP. The polling in favour of Scottish independence has still [not risen above 60 percent](#). Therefore, the SNP may put off the moderate voters they must convince by moving for a referendum now. However, this argument can be countered by pointing out that there may never be a less attractive UK to belong to than currently, with the country increasingly isolated through Brexit and governed by [English nationalists](#). Essentially, one must strike while the iron is hot.

Legislating for a second independence referendum risks proving, if challenged in the courts, that the Scottish Parliament simply does not have authority over the issue. The power would unambiguously belong to the British Government, who are opposed to authorising one. The SNP and Scottish nationalists would therefore be powerless. However, the politics are challenging for unionists too. Douglas Ross, leader of the Conservative Party in Scotland, has stated that [his party would boycott a Holyrood triggered referendum even if found to be lawful by the courts](#). This is a clear attempt to delegitimise a legal referendum but shows a genuine fear that the Scottish Parliament would be found to have the power to hold a referendum. It is also a risky political move, as his party may just appear undemocratic by boycotting a legal referendum. To sum up, opposing a second referendum if the SNP are elected on a manifesto to hold one in May is bad optics for unionists and the British Government. Taking the Scottish Government to court if they legislate to hold a second independence referendum would also look undemocratic, as would boycotting such a referendum if found to be lawful. Finally, refusing to enact the results of a referendum would be a difficult position for the British Government to maintain.

An interesting year ahead

Nicola Sturgeon and the SNP have thrown down a political gauntlet through their 11-point plan. It is just political, however: Mr Johnson and the British Government have control over the legal levers of Scottish independence, with the exception of Holyrood possibly having the power to hold only a referendum itself, as set out above. What the SNP can do is create irresistible political pressure at various stages of their roadmap for independence. As Mr Johnson heads to Scotland, he is sure to know that he must start winning the political argument if the UK is to survive.

